IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ATARI, INC.,
a Delaware corporation, and
MIDWAY MFG. CO.,
an Illinois corporation,
Plaintiffs,
vs.
NORTH AMERICAN PHILIPS CONSUMER ELECTRONICS CORP.,
a Tennessee corporation, and
PARK TELEVISION d/b/a PARK MAGNAVOX HOME ENTERTAINMENT CENTER,
an Illinois partnership,
Defendants.

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Civil Action No.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTIONS FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

At this very moment, defendants are engaging in a massive nationwide advertising campaign in an effort to flood the crucial pre-Christmas market with a home video game called "K.C. Munchkin," which is copied from Midway's highly popular and successful coin-operated "Pac-Man" video game. Unless immediately restrained and enjoined, defendants will succeed in stealing the immensely valuable market for a home video version of "Pac-Man" for which Atari has properly obtained a license.

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In addition to the irreparable injury which is presumed upon the prima facie showing of defendants' copyright infringement, there is immediate and demonstrable injury here. Defendants are out in the market place seeking to capitalize on the incredible demand for a home video version of "Pac-Man" by the advertising and sale of an unauthorized infringing copy, "K.C. Munchkin," and must be immediately stopped.

Plaintiffs Atari and Midway seek a temporary restraining order and immediate injunctive relief against defendants' copyright infringement, deceptive trade practices and unfair competition.

STATEMENT OF FACTS

In August, 1980, Midway acquired from Namco Limited, a Japanese company, the United States copyright and other rights in the "Pac-Man" electronic video game.*/ Since then, Midway has sold over 75,000 "Pac-Man" games at a wholesale value of over $150,000,00. (Affidavit of David Morafske ("Morafske Aff."), ¶8).

Coin-operated video games, such as Midway's "Pac-Man," are placed for public use in a wide variety of locations, such as arcades, bars, hotels, shopping centers, retail stores, and restaurants. Industry publications list "Pac-Man" as one of

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*/ Midway owns the United States copyright in the audiovisual work in the "Pac-Man" video game, which includes the images that appear on the television monitor of the video game and the associated sounds, and has obtained a Certificate of Registration of the copyright in the "Pac-Man" audiovisual work from the Copyright Office. (Verified Complaint Ex. A).

the top earning coin-operated video games ever introduced. It is conservatively estimated that the public spends over $15,000,000 per week to play "Pac-Man" video games. (Marofske Aff., ¶¶8, 11).

Atari is a leading developer and manufacturer of video games and personal computers. In order to exploit the widespread success and popularity of Midway's "Pac-Man" coin-operated video game and the potential for profits in the home video and personal computer market, Atari obtained the exclusive home video and personal computer rights to the "Pac-Man" video game and trademark. (Affidavit of Charles S. Paul ("Paul Aff."), ¶4).

Atari has committed over One and One Half Million Dollars in licensing, developing, and advertising its licensed "Pac-Man" home video game under these exclusive rights, and will introduce its Atari "Pac-Man" home video game in early 1982. Atari has already commenced the marketing effort for its "Pac-Man" game. For example, the soon-to-be-released Atari "Pac-Man" home video game has been prominently featured in full page color advertisements in major magazines such as Newsweek and Time. (Paul Aff., ¶5).

At least as early as November 11, 1981, defendant North American began advertising, distributing and selling an infringing home video game known as "K.C. Munchkin." This home video game is obviously copied from and substantially similar to the copyrighted "Pac-Man" coin-operated video game. (Affidavit of Michael Moone ("Moone Aff."), ¶7). North American is

currently advertising and selling "K.C. Munchkin" on a nationwide basis. North American's marketing efforts commenced with a full page color advertisement featuring the infringing "K.C. Munchkin" home video game in the November 16, 1981 issue of Newsweek magazine.*/ (Paul Aff. ¶2). Similar ads will appear in the near future in Time, People, and inflight airline magazines. (Paul Aff., ¶8).

North American apparently released a small number of the "K.C. Munchkin" games to test the market. (Affidavit of Thomas Gallo ("Gallo Aff."), ¶6). Response at the retail level has been great, with many retailers selling out of their initial allottment of units and placing large back orders. (Gallo Aff., ¶6; Affidavit of Lynda Pierce ("Pierce Aff."), ¶2). Within two weeks, North American plans to flood the pre-Christmas market with thousands of the infringing "K.C. Munchkin" home video games. (Gallo Aff., ¶6).

Distributors and retailers such as defendant Park are currently advertising and selling North American's infringing "K. C. Munchkin" and referring to it as a "Pac-Man type game." (Paul Aff., ¶8)**/ Retailers have held out "K.C. Munchkin" as being "just like Pac-Man." (Gallo Aff., ¶3; Pierce Aff., ¶2).

The advertising, distribution and sale of the infringing "K.C. Munchkin" home video game by defendants has subjected

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*/ A copy of the advertisement is attached to the Paul Affidavit as Exhibit A.

**/ A copy of such an advertisement is attached to the Paul Affidavit as Exhibit C.

Atari and Midway to irreparable injury. North American has wrongfully appropriated the demand for the "Pac-Man" game in the home video market by introducing its infringing "K.C. Munchkin" game, depriving Atari of the impact and profits that inure to the first company to market a home video version of a popular coin-operated game. (Paul Aff., ¶7). The anticipated flood of infringing "K.C. Munchkin" games into the high-volume pre-Christmas market will destroy the market for Atari's lawfully licensed and copyrighted "Pac-Man" home video game which will be introduced in 1982. (Paul Aff., ¶¶5, 7).

Defendants' illegal activities also wrongfully appropriate the value of Atari's investment in the authorized "Pac-Man" home video game and the potential for substantial profits that would accrue to Atari due to its exclusive home video and personal computer rights in the popular "Pac-Man" audiovisual work. (Paul Aff., ¶9). Defendants' actions also harm Midway by challenging the integrity of its "Pac-Man" copyright, which it has successfully enforced in actions and other proceedings involving over one hundred defendants.

Atari has notified defendant North American that "K.C. Munchkin" infringes the "Pac-Man" copyright and has demanded that North American immediately stop advertising, distributing and selling its infringing "K.C. Munchkin" home video game. Nevertheless, defendants are continuing their infringing acts.

ARGUMENT

I. PRELIMINARY RELIEF SHOULD BE GRANTED.

In order to obtain a temporary restraining order and a preliminary injunction, plaintiffs must demonstrate (1) a reasonable likelihood of ultimate success on the merits of at least one of their claims; (2) irreparable injury; and (3) a balance of hardships in their favor.*/

The courts have recognized that preliminary relief is essential in copyright infringement actions. Dallas Cowboy Cheerleaders, Inc. v. Scoreboard Posters, Inc. 600 F.2d 1184, 1187 (5th Cir. 1979). Several courts, including this one, have granted preliminary injunctions and temporary restraining orders against infringement of copyrights in the audiovisual works of electronic video games. See Atari, Inc. v. Armenia Co., No. 81-C-6099 (N.D.Ill. November 3, 1981) (Judge J. Sam Perry) (a copy of the Court's Order granting a temporary restraining order and preliminary injunction is attached as Exhibit A to this memorandum); Midway Mfg. Co. v. Drikschneider, 81-0-243 (D.Neb. July 15, 1981); Midway Mfg. Co. v. Krukenberg, 81-320-Orl-Civ-4, 81-321-Orl-Civ-Y (consolidated) (M.D.Fla. July 8,

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*/ Helene Curtis Industries, Inc. v. Church & Dwight Co., 560 F.2d 1325, 1330, 159 U.S.P.Q. 218, 220-221 (7th Cir. 1977), cert. denied, 434 U.S. 1070, 197 U.S.P.Q. 592 (1977); Milsen Co. v. Southland Corp., 454 F.2d 363, 367 (7th Cir. 1971); Stern Electronics, Inc., v. Kaufman, No. 80 C 3248 (E.D.N.Y. May 22, 1981), appeal docketed, No. 80-7411 (2d Cir. June 2, 1981) (video game copyright infringement action); Universal City Studios, Inc. v. Montgomery Ward & Co. Inc., 207 U.S.P.Q. 852, 856 (N.D.Ill. 1980); General Foods Corp. v. Borden, Inc., 191 U.S.P.Q. 674, 679-680 (N.D.Ill. 1976).

1981) Williams Electronics, Inc. v. Artic International, Inc., 81-1852 (D.N.J. June 24, 1981); Stern Electronics, Inc. v. Kaufman, 80 C 3248 (E.D.N.Y. May 22, 1981) appeal docketed, No. 81-7411 (2d Cir. June 2, 1981); Cinematronics, Inc., v. K. Noma Enterprise Co., No. Civ. 81-439 (D.Ariz. May 22, 1981).

In copyright cases such as this action, if probable success on the merits (i.e., a prima facie case of copyright infringement) is established, irreparable injury is presumed. See Midway Mfg. v. Drikschneider, supra, Slip Op. at 20 (D.Neb. July 15, 1981); Stern Electronics, Inc. v. Kaufman, supra, Slip Op. at 5 (E.D.N.Y. May 22, 1981). (Copies of these opinions are attached as Exhibits B and C, respectively, to this memorandum.) See also Wainwright Securities, Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 94 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978); Robert Stigwood Group, Ltd. v. Sperber, 457 F.2d 50, 55 (2d Cir. 1972); see generally 3 Nimmer on Copyright ("Nimmer") §14.06[A] at 14-50 (1980 Ed.).

As set forth below, plaintiffs satisfy these requirements and are therefore entitled to a temporary restraining order and a preliminary injunction.

A. Plaintffs Are Virtually Certain To Succeed On The Merits Of Their Copyright Claim

To prove their copyright claims,*/ plaintiffs must show (1) that they hold exclusive rights under a valid copyright

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*/ Courts have without exception held that audiovisual works, specifically including "Pac-Man", are proper subjects of

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for the audiovisual work "Pac-Man"; and (2) that defendant North American illegally copied (in the form of unauthorized reproduction, adaptation, public distribution, public performance or public display) that audiovisual work. Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1162 (9th Cir. 1977); Donnelly v. Guides to Multinational Business, 193 U.S.P.Q. 791, 792 (N.D.Ill.1976). In the instant case, each of the requirements for copyright infringement is satisfied beyond question.

Under the 1976 Copyright Act, Midway's Certificate of Registration (Reg. No. 83-768; Verified Complaint Exhibit A) establishes:

> prima facie evidence of the validity of the copyright and of the facts stated in the certificate. 17 U.S.C. §410(c).

As recogized in Midway Mfg. Co. v. Drikschneider, supra at 12-17, Midway owns a valid copyright in the "Pac-Man" audiovisual work. Moreover, Atari owns the exclusive right in such copyright in the United States for home video and personal computer use. (Paul Aff. ¶4).

Plaintiffs have also made a showing of infringement here. Infringement is shown by proof of defendants' access to the copyrighted audiovisual work "Pac-Man" and of the

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copyright protection under the Constitution and the Copyright Act. See e.g., Midway Mfg. Co. v. Drikschneider, supra ("Pac-Man"); Stern Electronics, Inc. v. Kaufman, supra; Cinematronics, Inc. v. K. Noma Enterprise Co., supra; Williams Electronics, Inc. v. Artic International, Inc., supra.

substantial similarity between the infringing audiovisual work "K.C. Munchkin" and the copyrighted "Pac Man." Midway Mfg. Co. v. Drikschneider, supra, at 17; Stern Electronics, Inc. v. Kaufman, supra at 9. See also Granite Music Corp. v. United Artists Corp., 532 F.2d 718, 721 (9th Cir. 1976); see generally Nimmer §13.01 (1980 Ed.).

In the instant case, North American certainly has had reasonable opportunity to view the copyrighted "Pac-Man" coin-operated game due to the presence of over 75,000 of such games in the market place, thus satisfying the access requirement. Nimmer §13.02[A] at 13-10 (1980 Ed.).

North American's infringing "K.C. Munchkin" is so similar to the copyrighted "Pac-Man" that retailers are advertising "K.C. Munchkin" as a "Pac-Man type game" and are representing to consumers that "K.C. Munchkin" is "just like Pac-Man." (Gallo Aff., ¶3; Pierce Aff., ¶3). In addition to numerous specific identical features, the overall appearance of the games is identical. (Moone Aff., ¶¶7, 8). Even though minor variations may exist between the "K.C. Munchkin" home video game and the copyrighted "Pac-Man" coin-operated video game, the games are still substantially alike. The only conclusion that can be reached is that defendants intentionally copied both plaintiffs' idea of the game and plaintiffs' unique copyrighted expression of those ideas. See Midway Mfg. Co. v. Drikschneider, supra at 19.*/ As Judge Learned Hand pointed

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*/ See generally Durham Industries, Inc. v. Tomy Corp., 630 F.2d 915, 911-913 (2d Cir. 1980); Sid & Marty Krofft

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out in Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49,56 (2d. Cir. 1936) cert. denied, 298 U.S. 669 (1936):

> [I]t is enough that substantial parts were lifted; no plagiarist can excuse the wrong by showing how much of his work he did not pirate.

Id.

Defendant Park's activities have infringed Atari's exclusive right to "distribute copies. . . of the copyrighted work ["Pac-Man] to the public by sale or other transfer of ownership, or by rental, lease or lending." 17 U.S.C. §106(3). North American, in its capacity as supplier of the infringing games, is also liable for Park's retail sales of the infringing "K.C. Munchkin." Universal City Studios v. Sony Corp. of America, No. 79-3683, 79-3735, 79-3762 (9th Cir. October 19, 1981) (contributory infringement found when manufacturer provided consumer with means to commit copyright infringement); Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1161-62 (2d Cir. 1971); Elektra Records Co. v. Gem Electronic Distributors, Inc., 360 F.Supp. 821, 822-23 (E.D.N.Y. 1973).

The facts and law proven by plaintiffs' show that plaintiffs are not only likely to succeed, but will in fact succeed on the ultimate merits of their copyright infringement

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Television Productions v. McDonald's Corp., 562 F.2d 1157, 1164-1165 (9th Cir. 1977); Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 907, 908-909 (3d Cir. 1975); McMahon v. Prentice-Hall, Inc., 486 F. Supp. 1296, 1304 (E.D. Mo. 1980); Dollcraft Industries, Ltd. v. Well-Made Toy Manufacturing Co., 479 F.Supp. 1105, 1116-17 (E.D.N.Y. 1978).

claims against defendants. The Copyright Act expressly authorizes courts to grant immediate injunctive relief in cases such as this, where a copyright is being infringed. 17 U.S.C. §502(a).

B. Plaintiffs Are Substantially Certain To Prevail On Their Unfair And Deceptive Trade Practices Claim As Well.

Immediate injunctive relief is also necessary since defendants are engaging in deceptive trade practices and plaintiffs are being irreparably harmed thereby.

The Illinois Uniform Deceptive Trade Practices Act mandates injunctive relief for deceptive trade practices including the following:

> (1) passing off goods or services as those of another;
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> (2) causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;
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> (3) causes likelihood of confusion or of misunderstanding as to affiliation, connection with or certification by another; or
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> * * * * * *
>
> (12) engaging in any other conduct which similarly creates a likelihood of confusion or misunderstanding.

Ill.Rev.Stat., Ch. 121 1/2, ¶312(1),(2),(3) and (12).

Distributors and retailers are "palming off" North American's infringing "K.C. Munchkin" home video game as a "Pac-Man type game" and holding it out as "just like Pac-Man." (Gallo Aff., ¶3; Pierce Aff., ¶3). Thus, the "K.C. Munchkin"

video game not only infringes the "Pac-Man" copyright, but confuses the public, and is clearly a deceptive trade practice as well, mandating injunctive relief under Illinois law. In addition, such "palming off" is a classic example of common law unfair competition. See, e.g., Baldassano v. Accettura, 336 Ill.App. 445, 84 N.E.2d 336 (1st Dist. 1949).

By enabling distributors to palm off the infringing "K.C. MunchKin" home video game, North American is also engaging in a deceptive trade practice itself and is responsible for the tortious acts of its distributors and retailers. Pennwalt Corp. v. Zenith Laboratories, Inc., 472 F.Supp. 413, 418 (E.D.Mich 1979).

It is clear that defendants' activities involving the advertising, selling, and palming off the infringing "K.C. Munchkin" video game constitute deceptive trade practices and unfair competition under Illinois law. The Illinois Uniform Deceptive Trade Practices Act mandates relief to immediately halt deception and competitive injury in cases such as this. Ill.Rev.Stat., Ch.121 1/2, ¶313.

II. PLAINTIFFS WILL BE IRREPARABLY INJURED UNLESS NORTH AMERICAN AND PARK ARE IMMEDIATELY ENJOINED: THE BALANCE OF EQUITIES TIPS DECIDEDLY IN PLAINTIFFS' FAVOR

Copyright infringements like those practiced by defendants automatically divest the copyright holder of the control mandated by the Constitution and the Copyright Act over his unique intellectual property. Accordingly, irreparable injury is presumed to exist in copyright infringement cases.

see Wainwright Securities, Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 94 (2d Cir. 1977); Nimmer §14.06[A] at 14-50, n.16 (1980 Ed.).

This Court has recognized that "irreparable damage to the plaintiff is inherent in the acts of copyright infringement." Reuben H. Donnelly Corp. v. Guides to Multinational Business, Inc., 193 U.S.P.Q. 791, 792 (N.D.Ill. 1976). In addition, the substantial amount of confusion and deception which arises from defendants' copyright infringement and unfair and deceptive trade practices constitutes irreparable harm requiring immediate injunctive relief. Ideal Industries, Inc. v. Gardner Bender, Inc., 612 F.2d 1018, 1024 (7th Cir. 1979); In re Vuitton et Fils, S.A. 606 F.2d 1, 4 (2d Cir. 1979). As stated by the court in Stern Electronics Inc. v. Kaufman, supra at 5:

> Preliminary injunctive relief is the only effective means of protecting a copyright in a video game since the life span of a successful game is merely six months. If knock-ups [infringing games] dilute a copyright's profitability during that period, a final adjudication in favor of the copyright owner will do him little good.

Immediate injunctive relief is critically essential here since North American is in the early stages of a nationwide pre-Christmas advertising, distribution, and sales campaign for its infringing "K.C. Munchkin" video game. These efforts include advertising in major magazines such as Newsweek Time, People, and inflight airline magazines. (Paul Aff., ¶8). Unless enjoined, in less than two weeks the critical high-volume pre-Christmas market will be flooded with with thousands of

infringing "K.C. Munchkin" home video games. (Gallo Aff., ¶6). The harm to Atari is particularly acute since its own copyrighted "Pac-Man" home video game will be released in early 1982. (Paul Aff., ¶5). Unless immediately stopped, North American will reap substantial profits from a confused public through sales of its infringing "K.C. Munchkin" home video game, leaving Atari irreparably harmed.

Atari is investment in obtaining the exclusive rights for and development of a home video version of the copyrighted "Pac-Man" game will be destroyed by North American's infringing "K.C. Munchkin." Indeed, so popular is the "Pac-Man" video game that defendants' infringement may induce consumers to buy North American's Odyssey II game instead of Atari's basic video game unit.

In addition to the irreparable injury facing Atari, Midway is also being damaged since defendants' unauthorized game will injure the reputation and goodwill of Midway's copyrighted "Pac-Man" coin-operated game.

Moreover, the public will continue to be confused and irreparably harmed if defendants are not immediately enjoined. Defendants are fostering such public confusion, seeking profits by advertising that "K.C. Munchkin" is a "Pac-Man type game" and holding it out as "just like Pac-Man." See Dealer Advertising v. Barbara Allan Financial, 197 U.S.P.Q. 611, 619 (W.D.Mich. 1977). Immediate injunctive relief is required to prevent this public confusion, especially during the Christmas buying season. See Dollcraft Industries, Ltd. v. Well-Made Toy

Mfg., 479 F.Supp. 1105, 1117 (E.D. N.Y. 1978); Leon B. Rosenblatt Tex. Ltd. v. M. Lowenstein & Sons, Inc., 321 F.Supp. 186, 189 (S.D. N.Y. 1970).

The irreparable injuries to Atari, Midway and the public far outweigh any hardship to defendants resulting from a grant of preliminary relief by this Court. Indeed, the Seventh Circuit has noted that a defendant should not be allowed to continue its infringing activity based on a claim that it would be harmed by having to cease doing what it has no right to do. Helene Curtis Industries, Inc. v. Church & Dwight Co., supra, at 1333.

CONCLUSION

Midway and Atari own the exclusive rights under the copyright protecting the audiovisual display in the "Pac-Man" video game. North American's "K.C. Munchkin" home video game infringes the "Pac-Man" copyright, and this infringement in and of itself provides a sufficient basis for preliminary relief.

In addition, the certainty of irreparable harm to Atari, Midway and the public resulting from defendants' copyright infringement and unfair and deceptive trade practices far

outweighs any hardship to defendants, thus mandating preliminary relief on behalf of plaintiffs.

Dated: November 18, 1981

Respectfully submitted,

/S/

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CERTIFICATE OF SERVICE

I, DANIEL W. VITTUM, JR., one of the attorneys for plaintiffs hereby certify that on November 18, 1981, I caused a copy of the Plaintiff's Memorandum in Support of its Motion for a Temporary Restraining Order and a Preliminary Injunction to be served on the following:

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DATED: November 18, 1981